BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of the Commission's Rules To Preempt State and Local Imposition Of Discriminatory And/Or Excessive Taxes And Assessments	))))	RM --

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR RULE MAKING OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

The Commission has the authority and the obligation to preempt discriminatory and/or excessive State and local taxes and assessments. This means that State and local excise, usage, property, utility and other taxes and assessments which (1) favor one telecommunications service or provider at the expense of another or (2) impede or preclude the offering of any telecommunications service by imposing excessive or unreasonable costs, are prohibited.

The Commission's preemptive authority has existed since 1934, and remains today. The Telecommunications Act of 1996 and the 1993 amendments to Section 332 of the Communications Act, in radically changing the entire telecommunications landscape, inevitably alter what constitutes "discriminatory" and "excessive" conduct barred by the Communications Act. The recent trend of State and local governments attempting to impose taxes in conflict with the Communications Act make urgent the Commission's exercise of its preemptive authority.

The reasons for Congress' actions and the resulting need for Commission intervention are readily apparent: the importance to the national economy of telecommunications services generally and CMRS in particular. Congress, in a radical, distinct policy shift, enacted sweeping changes in 1993 and 1996 that favor Darwinian competition -- where efficient, low-cost operations flourish -- over protectionist regulation. It necessarily and explicitly contemplated Federal, State and local government policies which uniformly decrease, rather than expand, costs

imposed upon telecommunications firms. Congress wanted to ensure that these significant activities were not disproportionately burdened. Given the circumstances in which CMRS carriers operate -- competitive milieus with multistate operations -- burdens imposed by one State's costs are not borne by only that State's consumers -- a principle that applies to taxes just as much as to other costs. This obviously presents a profound "moral hazard," one <u>requiring</u> a strong federal remedy.

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To: The Commission

PETITION FOR RULE MAKING OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA"),[1] pursuant to Section 1.401 of the Commission's rules,[2] hereby submits this Petition for Rule Making ("Petition") requesting the Commission to issue a Notice of Proposed Rule Making proposing to exercise its authority under the Communications Act of 1934, as amended, ("Communications Act"), to preempt State and local governments from imposing discriminatory or excessive taxes or other similar burdens on

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers.

2 47 U.S.C. § 1.401.

CMRS providers and services, and other telecommunications carriers and services.[3]

INTRODUCTION

The Commission's authority and obligation to prohibit discriminatory and/or excessive State and local taxes and assessments encompasses State and local excise, usage, property, utility and other taxes and assessments. The Commission's preemptive authority has existed since 1934. The authority was not altered by the passage of the Telecommunications Act of 1996 ("1996 Act") or of the 1993 amendments to Section 332[4] of the Communications Act. But, the 1993 and 1996 legislative provisions drastically alter the circumstances of the entire telecommunications sector. Those changes, in turn, alter the factual situation that the Commission is called upon to assess in determining whether State or local taxes are discriminatory or excessive. In other words, they affect what constitutes "discriminatory" and "excessive" and make more urgent the Commission's exercise of its preemptive authority.[5]

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3 This petition addresses only those State and local taxation practices which are barred by the Communications Act of 1934, as amended. There are, of course, numerous other limitations on the extent and form of State and local taxes found in the United States Constitution and in State constitutions and laws.

4 47 U.S.C. § 332.

5 The recent flurry of State and local taxation activity makes especially prudent the Commission's comprehensive inquiry into and limitation of such practices. CTIA includes as an Attachment to this Petition some recent examples of burdensome, discriminatory State and local tax requirements.

In revising Section 332 in 1993, and more recently, with the passage of the Telecommunications Act of 1996, Congress made clear its intention to deregulate much of the telecommunications services sector and to rely upon marketplace competition to secure consumer welfare. To that end, it also made clear its intention to remove State and local government legal requirements or practices which operate as barriers to entry to telecommunications providers, including CMRS providers, or to the interstate or intrastate offering of telecommunications services. This means that State and local governments are precluded generally from imposing discriminatory burdens between and among CMRS providers and other telecommunications carriers, and their service offerings.

The 1993 State rate and entry prohibitions in Section 332 were specifically designed to ensure the rapid buildout of a nationwide wireless communications infrastructure. State regulation was specifically identified as a possible barrier to entry and development, and was therefore severely circumscribed.

Section 253(a),[6] adopted in 1996, bars State or local requirements which explicitly or effectively prohibit the ability to provide interstate or intrastate telecommunications services.

The reasons for Congress' actions are self-apparent: the importance to the national economy of telecommunications services generally and CMRS in particular.[7] Congress in a radical,

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6 47 U.S.C. § 253(a).

7 Congress enacted the 1996 Act as a means to "provide for a pro-competitive, de-regulatory national policy framework

distinct policy shift, enacted sweeping changes that favor Darwinian competition -- where efficient, low-cost operations flourish -- over protectionist regulation. It necessarily and explicitly contemplated Federal, State and local government policies which uniformly decrease, versus expand, costs imposed upon telecommunications firms. Congress wanted to ensure that these significant activities were not disproportionately burdened. In addition, given the circumstances in which CMRS carriers operate -- competitive milieus with multistate operations -- burdens imposed by one State's costs are not borne by only that State's consumers -- a principle that applies to taxes just as much as to other costs.[8] This obviously presents a profound "moral hazard," one requiring a strong federal remedy.[9]

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designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). In revising Section 332 in 1993, Congress envisioned that CMRS providers would evolve to eventually provide competition to the incumbent LECs. See, e.g., 47 U.S.C. § 332(c)(3)(A); H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 493 (1993) ("Conference Report"). It thereby granted the Commission the authority to promote this competitive development, with the expectation that the Commission would properly exercise its grant to remove all unnecessary, disparate regulatory burdens on CMRS carriers.

8 While State and local action need not rise to the level of a constitutional violation to be actionable by the Commission, Commerce Clause precedent is instructive and in specific cases may form an independent basis for limiting State or local taxes. This is particularly likely in the many cases where CMRS firms' systems serve multiple States. The Supreme Court has held that the Commerce Clause, U.S. Const., Art. I, sec. 8, cl. 3, affirmatively empowers Congress to regulate commerce among the States, as well as prohibit State conduct that interferes with interstate commerce. Under the Court's holdings, a State tax scheme

The expansive language found in Sections 332 and 253 would encompass any State or local tax which impedes or precludes the offering of any or all telecommunications by imposing excessive

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violates the Commerce Clause if it: (1) is applied to an activity without substantial nexus to the State, (2) is not fairly apportioned, (3) discriminates against interstate commerce, or (4) is not fairly related to the services provided by the State. Complete Auto Transit, Inc. v Brady, 430 U.S. 274, 279 (1977), reh'g denied, 430 U.S. 976 (1977); see also Wonderland Ventures, Inc. v. City of Fremont, 423 F.2d 548, 551 (6th Cir. 1970) (local franchise fee held invalid because it imposed "a gross receipts tax upon proceeds from interstate commerce in violation of the commerce clause of the Constitution of the United States").

A tax is fairly apportioned when it is both internally and externally consistent. Internal inconsistency arises in cases of multiple taxation by States; in other words, if an entity is, or could hypothetically be, taxed on the same property by two or more states, the tax is not internally consistent. A tax is externally consistent only if a portion of the taxed revenues or, arguably, the value of the taxed property, is derived out of the taxing State, and the State has taxed only that portion which reasonably reflects the intrastate component of the activity being taxed. Goldberg v Sweet, 488 U.S. 252, 262 (1989). When determining whether a tax is discriminatory under the Commerce Clause, the Court is generally concerned that a State does not impose discriminatory taxes which favor intrastate commerce or which place undue burdens upon interstate commerce. Considering the interstate nature of CMRS, especially the contiguous cellular licenses that have been acquired by a single firm and the PCS MTA (and BTA) licenses -- geographic areas which do not respect State lines -- avoiding discriminatory treatment becomes problematic.

9 See FCC Wireless Telecommunications Bureau Chief Michele Farquhar, Remarks before the Metropolitan Washington Council of Governments: The Role of Wireless Telecommunications After the Telecommunications Act of 1996 (August 2, 1996) ("Some jurisdictions have begun imposing a tax on wireless service providers. While a technology-neutral, non-discriminatory tax falls within the authority of county and local governments, a tax imposed on particular technologies or companies may constitute a barrier to entry, which may be contrary to the mandates of the Act.").

costs or discriminatory treatment. While some may argue that the Conference Report language from the 1993 amendments to the Communications Act and the State Tax Savings provision in the 1996 Act preclude the direct and obvious application of Sections 332 and 253, the legislative history of the 1993 amendments does not preclude the preemption sought here.[10] Section 601(c)(2) of the 1996 Act, indicating that nothing in the 1996 Act shall be construed to authorize the modification, impairment, or supercession of any State or local law pertaining to taxation, similarly does not preclude preemption. The State Tax Savings clause means that Sections 253 does not give the Commission new or expanded <u>authority</u> with respect to tax preemption. But neither it nor the 1993 legislative history subtract from authority the FCC already enjoys under the Communications Act.

The new policy and market context produced by the 1993 and 1996 amendments inevitably affects the definition of "discriminatory" and "excessive." Moreover, any taxes or assessments imposed upon carriers or their services must be

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10 In the Conference Report accompanying the Omnibus Budget Reconciliation Act of 1993, the conferees agreed to drop statutory language which stated that licenses issued by the Commission shall not be treated as property of the licensee for property tax purposes by any State or local governmental entity. In so doing the conferees found: "It is the intent of the Conferees to clarify that nothing in this Act [the Omnibus Reconciliation Act of 1993] alters or affects the authority <u>or lack of authority</u> of State and local governments to assess *ad valorem* property, or other taxes on the licensee. The Conferees do not intend for the deletion of the proposed House and Senate language to create any other inference regarding the subject matter of the proposed provisions." Conference Report at 486-487 (emphasis added).

viewed cumulatively as well as separately. That is, to the extent that various State and local excise, usage, property, utility taxes, or other fees and assessments, individually or taken together, burden telecommunications providers and/or service entry, they should be prohibited. To the extent that one State or locality's taxing practices unfairly impact the buildout of a nationwide telecommunications infrastructure, they should be prohibited as well.

I. THE COMMISSION HAS THE AUTHORITY TO PREEMPT DISCRIMINATORY OR EXCESSIVE STATE AND LOCAL TAXES

While the 1993 amendments to Section 332 represent a watershed in the role of State regulation of CMRS, long before their passage, the Commission had the authority to preempt excessive and discriminatory taxes targeted at communications activities. That authority stems most fundamentally from the Congressionally articulated responsibility to secure "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[11] The Commission, with Congress' express

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[11] 47 U.S.C. § 151. See, e.g., Amendment of Part 76 of the Commission's Rules and Regulations with Respect to Technical Changes in the Wording of Section 76.31(b) Regarding Franchise Fees, 59 FCC 2d 378, 380 (1976) ("we think it important to reiterate briefly why we have felt it necessary to adopt such [franchise fee] limitations. Congress enacted the Communications Act of 1934 in order, among other things, to facilitate rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. 47 U.S.C. 1.") ("Franchise Fee Revision Report and Order"); Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, Memorandum Opinion and Order and Further Notice of Proposed Rule Making in Docket 21002, RM-2695, RM-2723, 71 FCC 2d 569, 582 (1979) ("The Commission's initial decision to enforce a limitation

approval, has relied upon its authority to preempt such fees and assessments, notably in the case of cable television franchise fees.[12]

In 1972, the Commission adopted its Cable Television Report and Order[13] imposing a franchise fee ceiling on cable television revenues between 3 and 5 percent. In the Notice of Proposed Rule Making which led to this Order, the Commission relied upon Sections 2, 3, 4(i), 4(j)[14] and Title III as authority to limit franchise fee assessments "to strike a balance which permits the achievement of the federal goals [expand the use of cable television to obtain market benefits to the public interest] and at the same time [permits] substantial revenues to the local

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on franchise fees rested on the Commission's responsibility under Section 1 of the Communications Act, 47 U.S.C. § 151, to provide for the expansion of interstate communications facilities at reasonable charges and on the belief that 'high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy.'") (citation omitted) ("Cable Television Memorandum Opinion and Order and Further NPRM").

12 An important consequence of the Commission's long-standing preemptive authority is that it renders irrelevant the debate surrounding the applicability of Section 332 and Section 253 to State and local taxation issues. Notwithstanding the Conference Report Statements regarding State and local taxation which accompany the Omnibus Reconciliation Act of 1993 or the State Tax Savings Provision found in Section 601(c)(2) of the 1996 Act, the Commission has independent, well-grounded authority to preempt State and local taxes which are discriminatory or excessive.

13 36 FCC 2d 143 (1972).

14 47 U.S.C. § § 152, 153, 154(i), (j).

entities."[15] The Commission also found unsettling taxes which are levied against cable television but not against other similar types of services.[16]

The franchise fee limitation thus was specifically intended to prevent State and local discrimination, a point noted when it was codified by Congress in 1984.[17] Congress found:

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15 Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationships in the Community Antenna Television System Fields, Notice of Proposed Rulemaking in Docket 18892, 25 FCC 2d 50, 53 (1970). Strongly factored into the Commission's proposal in this Notice was its recognition that its lack of intervention to date was based upon "policy rather than legal grounds." Id. at 51. In fact, the Commission cited Wonderland Ventures, supra, (Sixth Circuit invalidated local franchise fee as violative of interstate commerce clause) as a basis for its proposed limited intervention. Moreover, the Commission noted "that although practical considerations argue in favor of leaving important aspects of cable regulation to State and local government, cable is nonetheless an integral part of the inter-State movement of electronic communications.. . . In these circumstances, it is appropriate for this agency to establish uniform or minimum standards to which local actions must conform." Id. (citing United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (FCC's authority over "'all interstate . . . communications by wire or radio' permits the regulation of CATV systems;" such authority is "that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting").

16 See Section 76.31(b) of the Commission's Rules and Regulations Relative to the Limitation Upon the Fee that a Franchising Authority May Exact From a Cable System: Petitions for Declaratory Ruling, Memorandum Opinion and Order, 50 FCC 2d 540, 545 (1975) (Commission disfavored a "Florida tax [which] singles out cable television and does not reach television and radio broadcasting" because it tended to "discriminate against cable television vis-à-vis other forms of mass communications.").

17 See United Artists Cable of Baltimore, Memorandum Opinion and Order, 2 Comm. Reg. 1365, 1371 (1996) ("We further note that Congress has exhibited a strong desire to prevent attempts by local franchising authorities to evade the

> it is necessary to impose such a franchise fee ceiling because . . . without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors. This would clearly place cable operators at a competitive disadvantage and thus be detrimental to the public.[18]

The franchise fee limitation was expressly adopted to prevent excessive taxation of cable services as well. In 1972, the Commission noted:

> . . . many local authorities appear to have extracted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about five or six percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. . . . of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. . . . We are seeking to strike a balance that permits the achievement of federal goals and at the same time allow[] adequate revenues to defray the costs of local regulation.[19]

In other words, the Commission found that limiting the States' authority to assess excessive franchise fees is necessary to further national communications policy.[20] <u>This is especially</u>

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statutory five percent cap on franchise fees. During floor debate on the 1984 bill, Senator Goldwater pointed out that 'the overriding purpose of the 5 percent fee cap was to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns. This would be discriminatory and would place the private operators/owners at a disadvantage with respect to their competitors'" (citation omitted)).

18 S. Rep. No. 67, 98th Cong., 1st Sess. 25 (1983).

19 <u>Cable Television Report and Order</u>, Docket Nos. 18397, 18397-A, 18373, 18416, 18892, 18894, 36 FCC 2d 143, 209 (1972) (citation omitted).

20 The Courts have also recognized the importance of placing a cap on the fees that a franchising authority could charge a cable operator. In <u>ACLU v. FCC</u>, 823 F.2d 1554, 1558 (D.C. Cir. 1987), <u>cert. denied</u>, 485 U.S. 959 (1988), the Court of

true when the funds are assessed to raise revenues rather than cover the costs of regulation.

In the intervening years between its adoption in 1972 and the codification of the franchise fee limitation by Congress in 1984, the Commission had ample opportunity to revisit its limitation, yet it did not change its view about its legal authority or the desirability of a limit. On reconsideration, the Commission affirmed its earlier position, and found that, "[t]he use of the franchise fee mechanism as a revenue raising device frustrates our efforts at developing a nationwide broadband communications grid. Excessive fees or other demands in effect create an obstruction to interstate commerce which must be avoided."[21] In fact, the Commission further solidified its franchise fee limitation in 1976 when it determined to "treat as 'null and void' any franchise fee to the extent it violates the limit imposed by Section 76.31(b)."[22] Similarly, the Commission

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Appeals reiterated the point that "[t]he asserted purpose of [franchise fee ceiling] regulation was to prohibit local franchising authorities from stunting the growth of an increasingly important communications medium through the imposition of excessive fees."

21 See, Amendment of part 76 of the Commission's Rules and Regulations, Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket Nos. 20018-20024, 46 FCC 2d 175, 201 (1974)

22 Franchise Fee Revision Report and Order, 59 FCC 2d at 379. The Commission also confirmed that it, "continue[s] to regard Section 76.31(b) as a reasonable method of assuring that unduly burdensome franchise fees do not result in the frustration of national goals for cable television and believe[s] that the revisions adopted herein will aid in the administration of its provisions and eliminate some of the delay presently associated with its implementation." See id. at 381.

found, when revisiting the franchise fee limitation issue again in 1977, that:

> the fiscal needs of local and state governments have not lessened, and we have no reason to believe that the former propensity of some jurisdictions to assess exorbitant franchise fees, as evidenced in the comments here, has lessened; or that such fees would not be levied were we to delete our fee limitation. A significant burden was envisioned by cable interests commenting here. Since the promise of cable's abundance and diversity of services is integrally linked to its financial viability, we believe the fee limitation serves the goal of diversity and is thus within the scope of our authority.[23]

The franchise fee preemption was conducted pursuant to authority contained in Title I and Title III. The fact that CMRS firms are common carriers subject to Title II does not lessen the Commission's ability to preempt, notwithstanding the limitation on Commission jurisdiction found in Section 2(b).[24] Traditional Section 2(b) jurisprudence ("impossibility" analysis) also permits Commission preemption of excessive or discriminatory taxes or assessments.[25] The Commission is justified in limiting State and local discriminatory or excessive taxes and assessments

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23 Amendment of Subpart B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local regulatory Relationships, Report and Order in Docket No. 21002, 66 FCC 2d 380, 398 (1977) (citation omitted); id. at 392. See also, Cable Television Memorandum Opinion and Order and Further NPRM, 71 FCC 2d at 582; Memorandum Opinion and Order in Docket 21002, 57 RR 2d 509 (1984) (Proceeding terminated without action).

24 47 U.S.C. § 152(b).

25 Section 2(b) applies to intrastate telecommunications service offerings governed by Title II of the Communications Act. With respect to CMRS, it is explicitly and severely limited by Section 332(c)(3)(A). The 1996 amendments also reduce its scope.

to the extent they act as entry barriers[26] for interstate telecommunications services or providers and, with regard to CMRS, to ensure the efficient, competitive buildout of the nationwide wireless communications infrastructure.[27] The MTA (and BTA) service area structure governing PCS licenses -- geographic boundaries which do not respect State lines -- expressly recognizes and accounts for the inherently interstate nature of mobile services. For this reason, preemption of State regulation in favor of national standards would be warranted under a Section 2(b) analysis as well.

In Louisiana Pub. Serv. Comm'n v. FCC,[28] the Supreme Court recognized an "inseverability" exception to the limitation of the Commission's preemption authority set forth in Section 2(b)(1) of the Communications Act.[29] In Louisiana, the Court found that the

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26 See Implementation of the Local Competition Provision in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order in CC Dockets 96-98 and 95-185, FCC 96-325 at ¶ 1026 (released August 8, 1996) ("Our decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253.").

27 See infra discussion of Section 332 and its principles.

28 476 U.S. 355 (1986).

29 See 47 U.S.C. § 152(b) ("nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .").

FCC may preempt State regulation where it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation."[30] The Court accordingly cited with approval previous cases which relied upon the inseverability of interstate and intrastate policy components in concluding that preemption was warranted.[31]

The cases interpreting the Commission's preemption powers, both those surviving and those interpreting Louisiana, recognize both economic and physical inseverability. Economic inseverability occurs where a Commission economic policy could be rendered nugatory by inconsistent State regulations.[32] Physical inseverability occurs where enforcement of an inconsistent State regulation would be either physically impossible or require impractical alterations to the physical network.[33]

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[30] Louisiana, 476 U.S. at 376 n.4.

[31] See id. (citing North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1976), cert. denied, 434 U.S. 874 (1977) (inseparability doctrine gives FCC authority to allow subscribers to provide their own telephones and to preempt State regulations prohibiting connection of such phones)).

[32] See California v. FCC, 39 F.3d 919 (9th Cir. 1994) (on review of remand, FCC's limited preemption of State structural separation requirements for jurisdictionally-mixed enhanced services, and of CPNI and network disclosure rules upheld), cert. denied, 115 S.Ct. 1427; Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989) (FCC preemption of State Centrex marketing regulations, including structural separation requirements, upheld because interstate and intrastate components of the regulation could not be separated).

[33] North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1976), cert. denied, 434 U.S. 874 (1977), for example, concerned a North Carolina regulation which prohibited

State and local taxes that are excessive or discriminatory create a problem akin to physical inseverability. The policy supporting the Commission's prohibition of such taxes is the removal of State and local entry barriers and the promotion of an efficient, competitive buildout of a nationwide wireless communications network, the policy articulated in Section 1 in 1934 and refined in the 1993 and 1996 amendments. It will be impossible to achieve Congress' and the Commission's goal of creating competitive, efficient, interstate telecommunications services free of State and local entry barriers if telecommunications services, including CMRS, are subjected to differing, excessive or discriminatory approaches to taxation and revenue raising.

Preemption of inappropriate State and local regulation of telecommunications carriers is consistent with well-established FCC policies for other services. For example, in adopting rules to limit State regulation of earth stations, amateur radio antennas, and multipoint distribution services ("MDS"), the

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customer provided CPE unless used exclusively for interstate calls. In order for this regulation to coexist with federal regulations permitting customers to provide their own CPE, users would need access to separate lines for interstate and intrastate service, an impractical alteration to the network. See also California v. FCC, 75 F.3d 1350 (9th Cir. 1996) (upholding FCC preemption of technically incompatible State regulations for preventing disclosure of unpublished numbers when Caller ID goes into effect); National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422 (D.C. Cir. 1989) (recognizing similar problem with regard to State regulations in conflict with federal policy of unbundling of inside wiring, although remanding to FCC for more narrow FCC ruling).

Commission promoted legitimate federal objectives while maintaining the State's traditional police powers.[34]

The Commission's policy statement promulgating former § 25.104[35] to preempt unreasonable, discriminatory State zoning regulations targeted at earth stations provides a useful analogy to the relief requested in this case. In reliance upon its Section 1 and Title III authority,[36] and in conjunction with a then recent amendment to the Communications Act,[37] the Commission

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[34] Such action is also entirely consistent with the Commission's recent preemption of local restrictions on video reception devices to prevent discriminatory treatment and to ensure that local limitations do not unfairly affect consumers elsewhere. See Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, Report and Order, Memorandum Opinion and Order, and Further NPRM in IB Docket 95-59, and CS Docket 96-83, FCC 96-328 at ¶ 17 (rel. August 6, 1996). ("Similarly, requirements for permits and/or fees may provide a disincentive for potential consumers, if those requirements apply to one programming signal provider but not another."); Id. at ¶ 18 ("[A] regulation will be found to impair a viewer's ability to receive video programming signals if it unreasonably increases the costs of installation, maintenance or use of reception devices.").

[35] 47 C.F.R. § 25.104 (1986). The courts have relied upon Section 25.104 to preempt State and local regulations. See e.g., Kessler v. Town of Niskayuna, 774 F. Supp. 711 (N.D.N.Y. 1991); Neufeld v. City of Baltimore, 820 F. Supp. 963, 968 (D.Md. 1993) ("there is no question about the power of the FCC to preempt local regulations."); see generally James R. Hobson and Jeffrey O. Moreno, Preemption of Local Regulation of Radio Antennas: A Post Deerfield Policy for the FCC, 46 Fed. Comm. L.J. 433 (1994).

[36] Under Title III the Commission has power to establish a unified communications system.

[37] 47 U.S.C. § 605 (Congress intended by amendment to create certain rights to receive unscrambled and unmarketed satellite signals). Section 332, with its Congressional

found that Congress had established "a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation."[38] Therefore, the Commission promulgated a preemption policy designed to prohibit States from "arbitrarily favor[ing] one particular communications service over another."[39] This reflection of technology neutral principles is highly instructive.[40]

Similarly, section 97.15(e) of the FCC rules governs amateur radio towers.[41] In promulgating this rule, the Commission substantially curbed local limitations on amateur radio antennas. Specifically, the Commission required that State and local regulations which involve the placement, screening or height of amateur radio towers "must be crafted to accommodate reasonably

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mandate, among other things, to promote wireless competition to ensure a nationwide communications network, is, if anything, an even stronger statement of a federal interest than the Satellite Home Viewers Act codified at 47 U.S.C. § 605.

38 See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, Report and Order in CC Docket 85-87, ¶ 23 (rel. Jan. 5, 1986).

39 Id. at ¶ 25.

40 Federal preemption of State and local discriminatory and excessive taxes should be based upon technology neutral principles, i.e., the Commission should ensure equal State and local regulatory treatment among all CMRS providers and between CMRS providers and other providers of local access.

41 47 C.F.R. § 97.15(e). The courts have relied upon section 97.15(e) to preempt State and local regulations. See, e.g., Pentel v. City of Mendota Heights, 13 F.3d 1261 (8th Cir. 1994).

amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."[42] It does not denigrate the contributions and social importance of amateur radio to observe that it is dwarfed by the present and prospective significance to the nation of the efficient construction and operation of commercial mobile radio services.

In sum, the Commission has -- from its inception -- held jurisdiction to preempt State and local attempts to impose unreasonably excessive and discriminatory tax burdens or assessments upon all telecommunications carriers and their services. Use of that authority here will promote efficient competition in the local exchange market by ensuring that CMRS and other telecommunications providers are not unduly limited by governmentally-imposed costs and burdens.

II. CONGRESS' RECENT EFFORTS TO PROMOTE THE COMPETITIVE DEVELOPMENT OF TELECOMMUNICATIONS SERVICES, INCLUDING CMRS, OBLIGATES THE COMMISSION TO PREEMPT DISCRIMINATORY OR EXCESSIVE STATE AND LOCAL TAXES AND ASSESSMENTS.

In revising Section 332 in 1993, and more recently with the passage of the Telecommunications Act of 1996, Congress intended to promote a uniformly-regulated, efficient, competitive telecommunications marketplace. Congress explicitly envisioned that this process would evolve, with CMRS providers eventually acting as competitors to the incumbent LECs, and therefore

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42 See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, PRB-1, 101 FCC 2d 952, 960 (1985).

ensured that the Commission have the authority to adopt regulatory policies which promote this competitive atmosphere.[43]

The 1993 and 1996 Communications Act amendments represent a deliberate determination by Congress to limit the scope of State and local regulation as applied to CMRS carriers specifically, and to telecommunications providers more generally. As applied here, State and local governments are prohibited from imposing disproportionate, discriminatory burdens among CMRS providers and services, and more generally between CMRS services and other telecommunications services. Congress expressly contemplated a competitive environment for telecommunications, characterized by efficiency, open entry and overall lower costs of doing business, including the reduction of the types of costs imposed by Federal, State and local regulatory bodies. The radical policy shift

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43 Section 332 contains examples of Congress' recognition of and providing for competitive entry by CMRS carriers into the local exchange market. See, e.g., 47 U.S.C. § 332(c)(3)(A) ("Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.") As the legislative history clarifies, see Conference Report at 493, "the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the Conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means."

reflected in these recent Congressional mandates necessarily informs the definition of "excessive" or "discriminatory" activity on the part of State and local governments.[44] Where everyone is now a competitor and where costs have been lowered both by statutory changes and the inevitable workings of the market, discriminatory and excessive taxes will arise more often.

By its terms, Section 332 provides a clear statement by Congress that all similar CMRS services should be subject to the same, albeit minimal, regulatory treatment.[45] Specifically, Section 332(c)(3)(A) provides in relevant part:

> Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[46]

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44 See Morgan City v. South Louisiana Elec. Co-op., 31 F.3d 319, 322(5th Cir. 1994), cert. denied, 116 S. Ct. 275, (". . . state action is preempted if its effect is to discourage conduct that federal legislation specifically seeks to encourage. For example, in Xerox Corp. v. County of Harris, the Supreme Court held that a state tax could not be imposed on goods manufactured in Mexico, shipped to the United States, and held under bond in a customs warehouse awaiting shipment abroad. . . . The Court held that although a state tax on such goods was not expressly prohibited, its imposition was preempted because such a tax would manifestly discourage and financially penalize the very acts the federal law was meant to foster.") (citations omitted).

45 The policy goals of Section 332(a), 47 U.S.C. § 332(a)(1)-(4), involve not only open entry, but also maximizing the value (i.e., output) from our investment in CMRS facilities. That obviously does not prohibit taxing CMRS activities per se, but it does affect the assessment of what constitutes discriminatory and/or excessive taxes.

46 See 47 U.S.C. § 332(c)(3)(A). See also H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section

Thus, the statute provides that States have no authority over rates charged by CMRS providers,[47] nor can States regulate CMRS entry. While the Commission's preemption authority is somewhat circumscribed in situations where State intervention is necessary to protect consumer welfare, the entry prohibition is absolute in its expression. This means that direct or indirect, partial or complete, entry barriers are all prohibited.

Both the 1993 House and Conference reports detail Congress' intention to create a national policy for wireless services that minimizes intrusive federal and State regulation. Such a policy is predicated, in part, upon regulatory parity and uniformity notions, i.e., neither federal nor State nor local governments, by their regulatory efforts, are entitled to adopt regulations which introduce disparity among similar services.[48] It also is

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332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.") ("House Report").

47 To the extent that the tax or assessment constitutes impermissible State or local rate regulation, it is prohibited by Section 332 as well.

48 In revising Section 332, Congress sought to ensure regulatory parity among CMRS providers because "the disparities in the current regulatory scheme [e.g., private mobile carriers are exempted from State and federal regulation of rates and entry while common carrier mobile services are not] could impede the continued growth and development of commercial mobile services." See House Report at 260. See also Conference Report at 494 ("in considering the scope, duration or limitation of any State regulation [the Commission] shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.") (emphasis added).